No. 94-370

NOV 4 1994
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

WILLIAM S. FUNDERBURG, PETITIONER

v.

UNITED STATES RAILROAD RETIREMENT BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

CATHERINE C. COOK
General Counsel
Railroad Retirement Board
Chicago, Ill. 60611-2092

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the United States Railroad Retirement Board's decision not to reopen petitioner's 1978 application for disability benefits was judicially reviewable.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Aspros v. *Railroad Retirement Bd.*, 904 F.2d 384 (7th Cir. 1990)	2
Bennett v. *Tucker*, 827 F.2d 63 (7th Cir. 1987)	9, 10
Burleson v. *Railroad Retirement Bd.*, 711 F.2d 861 (7th Cir. 1983)	2
Califano v. *Sanders*, 430 U.S. 99 (1977)	5, 6, 7, 8, 10
Interstate Commerce Commission v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987)	8
Sones v. *United States Railroad Retirement Bd.*, 933 F.2d 636 (8th Cir. 1991)	4, 8-9, 10
Steebe v. *United States Railroad Retirement Bd.*, 708 F.2d 250 (7th Cir.), cert. denied, 464 U.S. 997 (1983)	5, 7, 8, 9
Szostak v. *Railroad Retirement Bd.*, 370 F.2d 253 (2d Cir. 1966)	9

Statutes and regulations:

Railroad Retirement Act of 1974, 45 U.S.C. 231 *et seq.*:	
45 U.S.C. 231a(a)(1)(v)	5
45 U.S.C. 231b(m)	5
45 U.S.C. 231g(§ 8)	2-3, 10
Railroad Unemployment Insurance Act, 45 U.S.C. 351 *et seq.*	3
45 U.S.C. 355(c) (1988 & Supp. IV 1992)	3, 7, 8
45 U.S.C. 355(f) (1988 & Supp. IV 1992)	3, 7, 8
45 U.S.C. 355(g)	3

Statutes and regulations—Continued: Page

45 U.S.C. 405(g) 6
20 C.F.R.:
Section 220.3 2
Section 404.1504 2

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-370

WILLIAM S. FUNDERBURG, PETITIONER

v.

UNITED STATES RAILROAD RETIREMENT BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 20-23) is unpublished, but the decision is noted at 23 F.3d 400 (Table). The decisions of the Railroad Retirement Board (Pet. App. 40-43) and the Hearings Officer (Pet. App. 24-39) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 1994. A petition for rehearing was denied on May 31, 1994. Pet. App. 44-45. The petition for a writ of certiorari was filed on August 29, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Railroad Retirement Act of 1974 (RRA), 45 U.S.C. 231 *et seq.*, former railroad employees "whose permanent physical or mental condition is such that they are unable to engage in any regular employment" are entitled to disability annuities. 45 U.S.C. 231a(a)(1)(v). The Railroad Retirement Board (Board), which administers the disability annuity program, has promulgated regulations governing disability determinations. The Board's regulations are substantially similar to those used by the Social Security Administration (SSA) to determine disability under the Social Security Act.[1] The Board's regulations provide, however, that "[d]eterminations of the Social Security Administration or any other governmental or nongovernmental agency about whether or not a claimant is disabled under the laws, regulations or standards administered by that agency shall be considered by the Board but are not binding on the Board." 20 C.F.R. 220.3. The SSA's regulations similarly provide that "a determination made by another agency that you are disabled * * * is not binding on us." 20 C.F.R. 404.1504.

Section 8 of the RRA, which governs judicial review of Board decisions under the Act, provides as follows:

> Decisions of the Board determining the rights or liabilities of any person under this subchapter shall be subject to judicial review in the same manner,

---

[1] Prior to the codification of the Board's current regulations, the Board applied Social Security regulations in determining disability under the Railroad Retirement Act. See, *e.g.*, *Aspros* v. *United States Railroad Retirement Bd.*, 904 F.2d 384, 386 (7th Cir. 1990); *Burleson* v. *Railroad Retirement Bd.*, 711 F.2d 861, 862-863 (8th Cir. 1983).

> subject to the same limitations, and all provisions of law shall apply in the same manner as though the decision were a determination of corresponding rights or liabilities under the Railroad Unemployment Insurance Act [45 U.S.C. 351 *et seq.*] except that the time within which proceedings for the review of a decision with respect to an annuity, supplemental annuity, or lump-sum benefit may be commenced shall be one year after the decision will have been entered upon the records of the Board and communicated to the claimant.

45 U.S.C. 231g. The Board's review of claims for benefits under the Railroad Unemployment Insurance Act (RUIA) is governed by 45 U.S.C. 355(c) (1988 & Supp. IV 1992). Judicial review is governed by 45 U.S.C. 355(f), which permits a petition for review in the courts of appeals to be brought by "[a]ny claimant, or any railway labor organization * * * of which claimant is a member, or any other party aggrieved by a final decision under subsection (c) of this section." The exclusivity of this provision is established by 45 U.S.C. 355(g), which states that "[f]indings of fact and conclusions of law of the Board in the determination of any claim for benefits or refund [and] the determination of any other matter pursuant to subsection (c) of this section * * * shall not be subject to review in any manner other than that set forth in subsection (f) of this section."[2]

Neither the RRA nor the RUIA alludes to the reopening of final decisions by the Board. However,

---

[2] Similarly, 45 U.S.C. 355(c) (1988 & Supp. IV 1992) provides that "[a]ny issue determinable pursuant to this subsection and subsection (f) of this section shall not be determined in any manner other than pursuant to this subsection and subsection (f) of this section."

Consolidated Board Order 75-5 provides that the Board may reopen final decisions on claims for RRA benefits. That Order states that the

> [f]actors to be taken into consideration in determining whether such a decision or certification is to be reopened include, but are not limited to, the following:
>
> (1) The responsibility of the applicant in not providing the new evidence, if any, upon which the request for reopening is based, at the time the original claim was made or at some other time prior to the date of the request for reopening;
>
> (2) The weight or probative value of any new evidence;
>
> (3) The responsibility of the Railroad Retirement Board in previously applying law or evaluating evidence incorrectly.

Consolidated Board Order 75-5, ¶ 17B (quoted in *Sones* v. *United States Railroad Retirement Bd.*, 933 F.2d 636, 637-638 (8th Cir. 1991)); see Pet. App. 63-64.

2. On May 22, 1978, petitioner William S. Funderburg filed an application for a disability annuity under the RRA. After receiving an initial decision denying his claim, petitioner appealed the decision to an appeals referee and then to the Board. On December 10, 1981, the Board issued a final decision denying petitioner's appeal. Petitioner did not seek judicial review of that decision. Petitioner's application for Social Security disability benefits was also denied. Petitioner did, however, seek judicial review of the denial of his application for Social Security disability benefits. Pet. App. 24; Pet. 4-5.

On April 24, 1985, petitioner applied for a reduced-age retirement annuity under the RRA. He was awarded an annuity beginning May 1, 1985, and he continued to

receive benefits for the next four years. In 1989 petitioner's RRA annuity was reduced after the Board was informed that the Social Security Appeals Council, on remand from the United States District Court, had awarded petitioner Social Security disability benefits retroactive to April 1, 1977. Pet. App. 24-25.[3]

Petitioner pursued administrative appeals of the Board's action reducing his RRA annuity, arguing, *inter alia*, that his 1978 application for an RRA disability annuity should be reopened. On May 14, 1992, the Board "affirm[ed] the decision of the hearings officer not to reopen the final decision with respect to the application filed May 22, 1978." Pet. App. 41. The Board did, however, reexamine petitioner's 1985 application for a reduced-age RRA annuity. "Based on its consideration of the record in this case," the Board determined that petitioner was "entitled to a disability annuity under [45 U.S.C. 231a(a)(1)(v)] based on the application he filed on April 24, 1985." Pet. App. 41.

3. Petitioner then filed a petition for review in the United States Court of Appeals for the Fourth Circuit, challenging the Board's refusal to reopen its denial of his 1978 application for a disability annuity. The court dismissed the petition for review for lack of subject matter jurisdiction. Pet. App. 20-23. Relying on *Califano* v. *Sanders*, 430 U.S. 99, 107-108 (1977), and *Steebe* v. *United States Railroad Retirement Bd.*, 708 F.2d 250, 254-255 (7th Cir.), cert. denied, 464 U.S. 997 (1983), the court held that "[a]bsent extraordinary circumstances, a decision of the Railroad Retirement Board not to reopen an earlier denial of a claim is not subject to judicial

---

[3] When an employee qualifies for benefits under both the RRA and the Social Security Act, the RRA benefits must be reduced by the amount of the Social Security benefits. 45 U.S.C. 231b(m).

review. * * * Therefore, since [petitioner] does not challenge the constitutionality of the Board's decision, this Court lacks jurisdiction to review the Board's decision not to reopen the case." Pet. App. 22-23.

ARGUMENT

The decision of the court of appeals is compelled by the statutory provisions governing judicial review of Board decisions, and by this Court's ruling in *Califano* v. *Sanders*, 430 U.S. 99 (1977). Although one court of appeals has permitted judicial review of the Board's refusal to reopen its denial of RRA disability benefits, we do not believe that the circuit conflict requires resolution by this Court at the present time.

1. In *Califano* v. *Sanders*, this Court held that the Social Security Act did not authorize judicial review of the decision by the Secretary of Health, Education, and Welfare not to reopen the denial of a claim for benefits under the Act. The Court held that 42 U.S.C. 405(g), which permitted judicial review of "any final decision of the Secretary made after a hearing," did not apply to the Secretary's refusal to reopen a prior decision. 430 U.S. at 108. The Court rested its decision in part on the facts that "a petition to reopen a prior final decision may be denied without a hearing" and that "the opportunity to reopen final decisions and any hearing convened to determine the propriety of such action are afforded by the Secretary's regulations and not by the Social Security Act." *Ibid.* The Court noted as well that to permit judicial review of refusals to reopen would subvert the statutory time limit for challenging the Secretary's final decision on the initial claim for benefits. *Ibid.* It stated: "Congress' determination so to limit judicial review to the original decision denying benefits is a policy choice obviously designed to forestall

repetitive or belated litigation of stale eligibility claims. Our duty, of course, is to respect that choice." *Ibid.*[4]

The statutory scheme governing judicial review of the Board's determinations is closely analogous to that which was at issue in *Sanders*. See *Steebe* v. *United States Railroad Retirement Bd.*, 708 F.2d 250, 255 (7th Cir.) ("Although *Sanders* addressed reopening under the Social Security Act, the reasoning in *Sanders* is equally applicable to the RRA."), cert. denied, 464 U.S. 997 (1983). Like the Social Security provisions at issue in *Sanders* (which authorized judicial review of "any final decision of the Secretary made after a hearing," 430 U.S. at 108), the RRA and RUIA restrict judicial review to a carefully defined category of Board decisions. A petition for review may be filed by any person "aggrieved by a final decision under subsection (c) of this section [45 U.S.C. 355(c)]." 45 U.S.C. 355(f) (1988 & Supp. IV 1992). Like the Secretary's refusal to reopen Social Security claims, the Board decision that petitioner seeks to challenge does not fall within the category of Board decisions subject to judicial review. "A decision by the Board not to reopen an application would not come within the terms of subsection (c) of section 355 of the RUIA; only an appeal from the original denial of the application for benefits would fit within subsection (c)." *Steebe*, 708 F.2d at 254.[5]

---

[4] The Court suggested, however, that judicial review might be available in "those rare instances where the Secretary's denial of a petition to reopen is challenged on constitutional grounds." 430 U.S. at 109.

[5] The statute makes clear that no alternative avenue for judicial review is available. See 45 U.S.C. 355(g) ("Findings of fact and conclusions of law of the Board in the determination of any claim for benefits or refund * * * shall not be subject to review in any

As with the Social Security scheme at issue in *Sanders*, moreover, the Board's authority to reopen the prior denial of a claim rests on a Board regulation and not on the governing statute. And as with the Social Security Act, to permit judicial review of refusals to reopen would subvert Congress's effort "to forestall repetitive or belated litigation of stale eligibility claims." *Sanders*, 430 U.S. at 108; see *Steebe*, 708 F.2d at 255. This Court's decision in *Sanders* therefore compels the conclusion that the Board's refusal to reopen its denial of petitioner's 1978 application is not subject to judicial review.[6]

2. Petitioner principally relies (Pet. 13-18) upon *Sones* v. *United States Railroad Retirement Bd.*, 933 F.2d 636 (8th Cir. 1991), in which the court of appeals entertained a petition for review of the Board's refusal to reopen a prior denial of disability benefits under the

---

manner other than that set forth in subsection (f) of this section.").

[6] *Interstate Commerce Comm'n* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987), is not to the contrary. The Court in *Locomotive Engineers* held that the ICC's refusal to reopen a prior decision was judicially reviewable (under an abuse of discretion standard) "[i]f the petition that was denied sought reopening on the basis of new evidence or changed circumstances." 482 U.S. at 284. In that case, however, the pertinent statute authorized judicial review of any "final order" of the Commission, see *id.* at 277; the Court noted as well that "[t]he Commission's authority to reopen and reconsider its prior actions stems from 49 U.S.C. § 10327(g)." 482 U.S. at 277. Here, by contrast, judicial review is available only for "final decision[s] under subsection (c) of this section [*i.e.*, 45 U.S.C. 355(c)]," 45 U.S.C. 355(f) (1988 & Supp. IV 1992); and the Board's authority to reconsider its earlier rulings is grounded in its own regulations rather than in the statute itself. The present case is therefore controlled by *Sanders* rather than by *Locomotive Engineers*.

RRA. The court held that the Board had abused its discretion in declining to reopen the earlier decision in light of the ruling of a Social Security ALJ that the claimant was entitled to disability benefits under the Social Security Act. *Id.* at 637-638. We acknowledge that the Eighth Circuit's reasoning in *Sones* cannot be squared with that of the Fourth Circuit in the instant case. For two reasons, however, we do not believe that the conflict requires resolution by this Court at the present time.

a. The Eighth Circuit in *Sones* did not discuss, or even cite, the statutory provisions governing judicial review of the Board's decisions. It also did not cite *Sanders* v. *Califano*, but relied exclusively on *Szostak* v. *Railroad Retirement Bd.*, 370 F.2d 253, 254-255 (2d Cir. 1966), a case that well predated *Sanders*. See 933 F.2d at 638. Given the Eighth Circuit's failure to discuss the most relevant authorities, we believe that other courts of appeals are unlikely to find its analysis persuasive.[7]

---

[7] The Eighth Circuit minimized the significance of *Steebe*, asserting that "the Seventh Circuit has limited its own holding in *Steebe* * * * to the specific facts of that case." *Sones*, 933 F.2d at 638 n.2 (citing *Bennett* v. *Tucker*, 827 F.2d 63, 73 n.7 (7th Cir. 1987)). That statement is literally true but seriously misleading. The defendant in *Bennett* relied upon *Steebe* for the broad proposition that the State's decision to "close" an individual's claims precluded a subsequent constitutional challenge to the State's action. 827 F.2d at 72-73. The court rejected that contention, noting that *Steebe* "turned on [its] specific facts, and thus ha[s] no relevance in this action. In *Steebe*, we held that Congress had divested the federal courts of jurisdiction to review the Railroad Retirement Board's decision not to reopen a claim." 827 F.2d at 73 n.7. Although the *Bennett* court thus "limited" *Steebe* to the context of Board refusals to reopen, it did not suggest that the unavailability of judicial review otherwise turned on the peculiar facts at issue in *Steebe*.

b. The claimant in *Sones* received the final decision of the Board, denying his claim for RRA disability benefits, on May 30, 1989. 933 F.2d at 637. Less than five months thereafter (on October 6, 1989), Sones requested that the Board reopen its decision in light of the favorable Social Security ruling. *Ibid.* Thus, at the time he requested reopening, Sones had a live, appealable claim. See 45 U.S.C. 231g (establishing a one-year period for seeking judicial review of Board decision with respect to an annuity under the RRA). Although the Eighth Circuit did not rely on that fact in explaining its decision to exercise jurisdiction, it is clear that Sones's petition for review did not raise the same danger of "repetitive or belated litigation of stale eligibility claims," *Sanders*, 430 U.S. at 108, as did the petition for review in the instant case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

CATHERINE C. COOK
General Counsel
Railroad Retirement Board

NOVEMBER 1994